Mr Justice Davis

Submitted

1-246 10 Dec -

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~205.~~ 76

JOHN W. BUTTERFIELD, APPELLANT,

vs.

GEORGE USHER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 20, 1873.

A. Ct. 1

SUPREME COURT OF THE UNITED STATES.

No. 293.

JOHN W. BUTTERFIELD, APPELLANT,

vs.

GEORGE USHER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Clerk's certificate	*a*	1
Original bill	1	1
Answer of defendant	4	2
Replication	5	3
Decree appointing trustee to sell	6	3
Affidavit of C. B. Bailey, on behalf of defendant	7	3
Report of sale by trustee	8	4
Affidavit of H. T. Taggart and others	10	4
Decree, special term, nisi, confirming sale	18	7
Report, 2nd, of trustee of conveyance	19	8
Decree, special term, on final ratification of sale	20	8
Vacation of final decree, in special term, leave to move	21	9
Affidavit of J. T. Fales and others	22	9
Vacation of final decree, motions and reasons for	25	10
Affidavit of John Bailey	28	11
Refusal of defendant's motion to vacate	29	11
Proceedings in general term	30	12
Decree, general term, affirming decree special term	30	12
Decree, general term, vacation of, leave to show cause for	30	12
Bids in advance of sale price, defendant allowed to procure	31	12
Advance bid of Hauptman	32	12
Advance bid of J. C. Smith	33	13
Affidavits in behalf of Butterfield	34	13
Deed to Butterfield	36	14
Affidavits on behalf of Butterfield	41	15
Decree, final, for resale	48	17
Bond of appeal	50	81

a AUTHENTICATION OF RECORD.

Clerk's certificate.

Clerk's office, supreme court of the District of Columbia.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 18th day of October, 1873.

[SEAL.] R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Assistant Clerk.*

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the fore going attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 18th day of Oct., 1873.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's certificate to justice's official character.

I, , clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this day of , 18 .

, *Clerk.*
By , *Assistant Clerk.*

1 *Original bill.—Filed Dec.* 23, 1871.

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON *vs.* GEORGE USHER. } No. 2621. Equity docket, 11.

This complainant says:

1. That he is a resident of the District of Columbia, as is also the defendant.

2. That on the day of , in the year 1871, he obtained a judgment for $100 before Justice David R. Smith, one of the justices of the peace in and for the said District, which said judgment was afterwards entered upon the docket of this honorable court, as is provided by law, as law-case No. 8614, to record whereof reference is made; and thereby received the same effect and validity as if it had been a judgment of this court.

3. That on and after the 6th day of August, 1865, the defendant, George Usher, was seized of a certain piece or parcel of ground, known as the north half of lot No. 5 in square No. 531, in the city of Wash-

2 ington, which said lot was conveyed to the said Usher by Thomas Francis, as will more fully appear by a deed from said Francis to him, recorded in Liber R. M. H. No. 13, folio 273, one of the land-records of the said District of Columbia, to which reference is here made.

4. That subsequently the said Usher conveyed the above-described property, by a deed dated May 9th, 1867, to S. L. Phillips, in trust, to secure $440 then due about $900 of rent thereafter to accrue due, by said Usher to G. W. Cochran and F. Lutz, to which deed, recorded in Liber E. C. E. No. 5, folio 234, of the said land-records, reference is here made.

5. That on the 17th of June, 1867, the said Usher made a second deed of trust, conveying the said property to J. J. Johnson, to secure the payment of $565 due by said Usher to one John W. Usher, as will more fully appear by said deed, recorded in Liber E. C. E. No. 8, folio 181, of the land-records of said District, to which reference is here made.

6. That on the 9th day of May, 1868, the said Usher made a third deed of trust, conveying said premises to one Henry S. Davis, to secure the payment of $1025 due by said Usher to one Francis A. Lutz,

3 as will more fully appear by said deed recorded in Liber No. 561, folio 58, of the land-records of said District, to which reference is here made.

7. That a fi. fa. was duly issued upon the said judgment, and was, on the 7th day of October, 1871, returned by the marshal "nulla bona," and the said judgment remains entirely unpaid and unsatisfied.

8. That the equitable interest of defendant in said lot and premises is of considerable value, to wit, of the value of $500, or more than sufficient to pay the amount due the plaintiff on his said judgment.

The plaintiff therefore prays:

1. That the said Usher be made a party hereto and served with process.

2. That the defendant's equity of redemption, in the above-mentioned property, be subjected to the payment of said judgment, and be sold to pay the same.

3. And for such other and further relief as to the court may seem meet.

H. S. JOHNSTON.

4 *Answer of def't to original bill.—Filed Mar.* 5, 1872.

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON *vs.* GEORGE USHER. } No. 2621. Equity docket 11.

In answer to complainant's bill of complaint, or so much thereof as this defendant is advised is material for him to answer, says—

That the allegations of said bill are substantially correct.

That the deeds of trust upon the property, described in complainant's bill, were executed in good , for a valid consideration and prior to the time when complainant obtained a judgment against this defendant.

This defendant further represents unto your honors that he is now, and for several weeks past has been, endeavoring to make private sale of said property, and to this end has caused said premises to be adver

tised for sale in the Evening Star, a newspaper printed and published in the city of Washington.

5 That a sale of said premises at public auction, at this time, would result most disadvantageously to this defendant, and would, in reality, as he really believes, be a great sacrifice of the property.

That the value of said property is between six and seven thousand dollars, and that to subject it to sale in order to satisfy a payment of one hundred dollars would be a great hardship upon this defendant. And having answered substantially all the allegations of complainant's bill, he prays to be hence dismissed with his proper costs.

J. W. MOORE,
Att'y for Def't.

Replication.—Filed May 4, 1872.

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON
vs.
GEORGE USHER. } No. 2621. Equity docket 11.

The complainant joins issue on the defendant's answer.

FRANCIS MILLER,
Sol'r for Compl't.

6 *Decree of sale.—June* 7, 1872, *in special term.*

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON
vs.
GEORGE USHER. } No. 2621. Equity docket 11.

This cause coming on to be heard on bill, answer, and replication, and being duly considered, it is ordered that Francis Miller be appointed trustee to sell the equity of redemption in the property named in the bill of the said defendant; that the trustee shall advertise the same in the Evening Star newspaper twice a week for three weeks, and shall sell on the following terms: One-third of the purchase-money to be paid in cash, and the remainder in two equal payments, at six and twelve months, the conveyance of the property to be made only upon the full payment of said purchase-money; the said trustee shall give security for the faithful performance of his duties in the sum of two thousand dollars before entering upon the performance thereof.

D. C. HUMPHREYS, *Justice, &c.*

7 *Affidavit of C. B. Bailey, behalf of def't.—Filed Oct.* 12, 1872.

DISTRICT OF COLUMBIA, *ss:*

This day personally appeared Charles B. Bailey, who made oath that he knows George Usher, and knows the property on 4th street, Washington City, in square 531, which said Usher claims to own; that about one year and a half ago affiant and said Usher had some talk together with a view to affiant's purchasing said property, and affiant looked at the property with that view; that in affiant's opinion said property was

then fully worth fifty-five hundred dollars, and is now more valuable than then.

CHA'S B. BAILEY.

Sworn to and subscribed before me this 11th day of October, 1872.
GEORGE W. HAUPTMAN, *J. P.* [SEAL.]

8 *Trustee's report of sale, Oct.* 16, 1872.

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON *vs.* GEORGE USHER. } No. 2621. Equity docket 11.

The undersigned, appointed by a decree of this court issued the 7th day of June, 1872, trustee, to sell the equity of redemption of said George Usher in north half of lot No. 5, in square No. 531, in the city of Washington, D. C., respectfully reports that, in accordance with the wishes of the solicitor of said Usher, he delayed advertising the said equity of redemption for sale for two or three months, in order to allow him an opportunity of raising money to pay off the judgment of the complainant Johnston, but nothing having been done, and the said Johnston urging that the decree should be complied with, he proceeded to advertise the property for sale, in the Evening Star, according to the terms of the decree; a copy of which advertisement is hereto appended. On Monday, September 30th, this trustee proceeded to sell said equity of redemption, and one John W. Butterfield being the highest bidder, the same was sold to him for the sum of eleven hundred and seventy-
9 five dollars. There was a good company at the sale, and several bidders, and the sale appears to be for a fair value of the interest of Usher.

The purchaser has paid the usual deposit, and is prepared to comply with the terms of sale upon the ratification of the same.

FRANCIS MILLER, *Trustee.*

Subscribed and sworn to before me this 16th Oct., 1872.
R. J. MEIGS, *Clerk, &c.,*
By L. P. WILLIAMS, *Ass't Clerk.*

10 *Affidavit of H. T. Taggart showing incumbrances.—Filed Oct.* 26, 1872.

I find from an examination of the title of George W. Usher to the north half of lot 5, square 531, that it is subject to the following liens and incumbrances, to wit:

GEORGE USHER *to* H. S. DAVIS. }

Deed of trust, dated May 9, 1868, and recorded same day in liber 561, fo. 158, given to secure the payment of a certain promissory note for the sum of $1,025.00 of same date, made by said Usher, and payable to the order of C. A. Lutz, in twelve months after the date thereof, with interest.

GEORGE USHER
vs.
J. J. BRIGHT AND MARTHA COGGSWELL.

Deed of trust, dated 25 Jan'y, 1872, and recorded 29 Jan'y, 1872, in liber 670, f. 232, given to secure the payment of a certain promissory note of same date for the sum of $762.62, made by said Usher and payable to the order of Jane Taylor, twelve months after the date thereof, with interest.

11 The following judgments are of record against Usher:

No. 6817. Favor of Noah Walker & Co., $55; int. from Oct. 1, '68, and costs.
" 7743. " " R. B. Williamson, 49.56; " " " 1, " " "
" 8614. " " H. S. Johnson, 100.00; " " June 6, '71, " "

Taxes due and unpaid.

For the year 1868....	$43 29	Adv't'g.....	$2 25
" " " 1869....	47 85	"	3 60
" " " 1870....	61 52	Com	11 56
" " " 1871....	58 11		210 72
			$228 18
Assessment for water-main.....			22 63
			$250 81

This is a partial examination, and does extend beyond the year 1865. Oct. 26, 1872.

HUGH T. TAGGART,
Attorney at Law.

DISTRICT OF COLUMBIA, *ss:*

On this 26th day of October, 1872, personally appeared before me Hugh T. Taggart, and made oath that the statement' contained in the foregoing certificate by him subscribed are true.

E. L. SCHMIDT, *J. P.* [SEAL.]

12 *Affidavit of F. D. Cleary as to fairness of sale.—Filed Oct.* 26, 1872.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, the subscriber, within and for the county and District aforesaid a notary public, FRANCIS D. CLEARY, of the firm of Latimer & Cleary, who, first being duly sworn, according to law, deposes that he now is, and for many years has been, a resident of the city of Washington, in the business of auctioneer; that as auctioneer, on the thirtieth day of September, A. D. 1872, at six o'clock in the afternoon, in front of the premises, he sold at public auction part of lot 5, in square 531, in the said city of Washington. The sale of said part of lot was made in good faith to John W. Butterfield as the highest bidder; that in all respects conforming to the usual custom and practice of sales of real estate in said city at auction was the said sale made. In the morning of the said day of sale I caused a red flag to be displayed in front of the said premises, where it remained during the day and until the sale closed. At half past five o'clock in the afternoon I caused a bell to be rung up and down the

street in front of the said premises and until the time of sale. The day of the sale was fine, and many people were passing by before the sale commenced. At no hour of the day at that season of the year,
13 according to my experience, do so many people pass on the streets as at time of said sale—six o'clock in the afternoon; that the number of persons at said sale was equal to the number usually and ordinarily attending such auction sales; that the terms of sale were read by me, in the presence and hearing of all the persons present as aforesaid, before asking for bids; that there were four or five bidders; that, considering the incumbrances on said lot, it brought a fair price.

And further your deponent saith not.

F. D. CLEARY.

DISTRICT OF COLUMBIA, *ss:*

Sworn and subscribed to before me this 26th day of Oct., 1872.

[L. S.] J. N. DICKSON,
Notary Public.

Affidavit of H. S. Johnston as to fairness of sale.—Filed Oct. 26, 1872.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, the subscriber, within and for the District of Columbia a notary public, HORACE S. JOHNSTON, who, first being duly sworn, according to law, deposes that he is a resident of the city of Washington, doing business in said city; that he is the owner of real estate in said city; that he is acquainted with and is fa-
14 miliar with the value of real estate in that part of said city wherein is situate part of lot No. five (5) in square five hundred and thirty-one, (531;) that he attended an auction sale of said part of lot, on the 30th day of September, A. D. 1872, by the firm of Latimer & Cleary; that he was a bidder at said sale; that the price at which said sale was made was greater than he was willing to pay; and that, according to his best knowledge and belief, said part of lot No. 5, with its appurtenances, was sold for all its worth and value.

He further deposes that before and at the time of the said sale many persons passing by on the street in front of said lot stopped and remained until the property was sold by the auctioneer, Mr. Cleary; that four or five different persons made bids; that the terms of sale were read in a loud and distinct voice by the auctioneer before offering said lot for sale and asking for bids; that the person, J. W. Butterfield, who was the last bidder, and to whom the lot was sold as aforesaid, was a stranger and unknown to said deponent at the time of said sale; that, accord-
15 ing to his best knowledge and belief, and in his opinion formed from personal experience and investigation, the price of real estate (the cost of the improvements, so called, not yet paid for being taken into the account) in that part of the city wherein is situate said lot is less to-day than it was two years ago.

And further deponent saith not.

H. S. JOHNSTON.

DISTRICT OF COLUMBIA, *ss:*

OCT. 25, 1872.

Sworn and subscribed to before me on the day and date above written.

[L. S.] J. N. DICKSON,
Notary Public.

16 *Affidavit of H. H. Dudley as to value of real estate.—Filed Nov.* 6, 1872.

HENRY H. DUDLEY, being first duly sworn, doth depose, and on his oath say that he is, and has for many years been, engaged in the city of Washington, D. C., in the business of selling real estate; that he knows the property sold under the decree in the above-entitled cause, and that, in his opinion, the said lot and improvements together are not worth and could not be sold for more than $4,000.00; and he thinks that the price paid by the purchaser, to wit, $1,100.00, for the equity of redemption, assuming that the incumbrances and taxes amounted to about $2,800.00 or $3,000, was a good sale and a reasonable and fair price.

HENRY H. DUDLEY.

Subscribed and sworn to before me this 6th day of November, 1872.

R. J. MEIGS,
Clerk, &c.,
By L. P. WILLIAMS,
Ass't Clerk.

17 *Affidavit of Thos. W. Soran as to value of lot.—Filed Nov.* 15, 1872.

Personally appeared Thomas W. Soran, who made oath in due form of law that he is a resident of Washington City for many years last past; that he knows the property on 4th street, bet. E & F, said to belong to George Usher; that the lot without the improvements is worth three thousand dollars; the improvements are a nearly new two-story brick dwelling with side balcony, but affiant does not state their value, not having examined the interior of the house. Said property is opposite the public grounds, a square south of the jail, and when the latter is removed and the grounds adjacent improved, as affiant believes is shortly to be done, said Usher's property will necessarily enhance in value; that affiant's opinion as to the value of the lot as aforesaid is made without estimating an enhancement of value by reason of a probability of the removal of the jail aforesaid.

T. W. SORAN.

Sworn to and subscribed before me this 15th day of November, A. D. 1872.

[L. S.] JAS. S. EDWARDS,
Notary Public.

18 *Sale confirmed nisi Nov.* 15, 1872.

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON *vs.* GEORGE USHER. } No. 2621. Equity docket 11.

This cause having come on, on the report of the trustee appointed to sell the property mentioned in the bill, and said trustee having reported that he has made sale of the said property, it is this 15th day of November, 1872, ordered, that the said sale so reported be, and the same

is hereby, confirmed, unless cause to the contrary be shown on or before the 10th day of December, 1872.

By the court:

A. WYLIE.

19 *Trustee's 2nd report on conveyance, Dec.* 12, 1872.

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON *vs.* GEORGE USHER. } 2621. Equity docket 11.

The further report of the trustee, Francis Miller, appointed by the court in the above cause to make sale of certain real estate in said cause mentioned, shows:

The former report of the trustee in this cause having been presented to the court, and the sale thereby reported having been ratified and confirmed, unless cause to the contrary should be shown on or before the 10th day of December, 1872, and no cause having been shown, the said purchaser John W. Butterfield having fully complied with the terms of said sale by paying to said trustee the sum of $1,175.00, being the purchase-price of said property so sold to him, together with the sum of $14.10, being the interest of said purchase-price from the 30th day of September, 1872, to the 12th day of December, 1872, a deed of conveyance of the interest of the defendant in said property at the time of filing said original bill, in due form of law, has been executed and delivered to the said premises, by the said trustee.

FRANCIS MILLER.

Subscribed and sworn to before me this 12 day of December, 1872.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Ass't Clk.

20 *Final ratification of sale and conveyance, and referring to auditor Dec'r* 12, 1872.

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON *vs.* GEORGE USHER. } No. 2621. Equity docket 11.

This cause having come on for further hearing upon the second report of the trustee, Francis Miller, showing that the purchaser had fully complied with the terms of the sale before reported, by paying the whole of the purchase-money with interest from the day of sale, and that a deed of conveyance of the said property had been made and executed in due form of law by said trustee and delivered to said purchaser, it is this twelfth day of December, A. D. 1872, ordered, that the said sale be, and the same is hereby, ratified and in all things confirmed, no cause to the contrary having been shown, and that the said conveyance is hereby confirmed. And it is further ordered that this cause be, and the same is hereby, referred to the auditor to make distribution of the fund, and state the account of said trustee, and to make the usual allowances.

By the court:

A. WYLIE.

21 *Vacation of final decree, with leave to move to set aside sale Dec. 14, 1872.*

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON
vs.
GEORGE USHER. } No. 2621. Equity docket 11.

On motion of the defendant, by his solicitor, it is this 14th day of December, 1872, ordered that the order made in this cause on the 12th inst. finally ratifying and confirming the sale to J. W. Butterfield of the property in these proceedings mentioned, be, and the same hereby is, annulled. And it is further ordered that leave be granted to said defendant until Saturday the 21st December, 1872, to show cause against the confirmation of said sale, and that notice be given to said Butterfield that on said date the motion to vacate said sale will be heard by this court.

By the court:

A. WYLIE.

22 *Affidavit of J. T. Fales, behalf def't.—Filed Dec. 20, 1872.*

This day personally appeared JOSEPH T. FALES, who, being first duly sworn according to law, doth say: I reside on 4th street west, between E & F streets north, at No. 515, in the city of Washington, and own the property where I reside; said property adjoined a lot and residence, which is said to belong to George Usher of said city, and described in certain proceedings pending in the supreme court of the District of Columbia, to which proceedings said Usher is a party. I believe my property adjoining said property of said Usher's is worth and would readily sell for two dollars per square foot, and I know no reason why said lot belonging to Usher is not worth the same price. Said price ot two dollars per foot is, in the opinion of this affiant, a fair valuation of real estate lying along said street in said square.

Further, affiant that he knows said Usher property has on it a two-story brick residence, but affiant does not know what its value is, having never examined the same, and therefore declines to give an estimate of its value. Further affiant saith not.

J. T. FALES.

Sworn to and subscribed before me this 17th day of Dec'r, 1872.
[L. S.] THOMAS C. CONNOLLY,
Notary Public.

23 *Affidavit of E. C. Ingersoll, behalf of def't.—Filed Dec. 20, 1872.*

EDWARD C. INGERSOLL, residing in the city of Wasington, D. C., being duly sworn, deposes and says that he has lived on 4th street, N. W., in said city, in the house adjoining 513 on said street, during most of the time since 1867; that his mother is the owner of the property adjoining No. 513; that this affiant knows the value of property on said street; that the ground on said square in which 513 is situate is worth at least $2.00 per foot. Affiant believes, from his own knowledge of property in said square and the values thereof, that the house and lot known as No. 513 is worth at least $5,000.

EDWARD C. INGERSOLL.

Subscribed and sworn to before me this 13th day of December, 1872.

T. D. ANDERSON,
Examiner in Chancery.

24 *Affidavit of J. H. Bird, behalf of defendant.—Filed Dec.* 20, 1872.

DISTRICT OF COLUMBIA,
City of Washington, ss:

This day personally appeared JOHN H. BIRD, who, being first duly sworn according to law, did say:

I am a carpenter and builder, residing in and doing business in the city and District aforesaid. In the year 1865, I built for George Usher, of said city, a brick residence on his lot fronting on 4th street west, between E & F streets north, in said city, being the same property mentioned in a chancery suit pending in the supreme court D. C., between H. S. Johnston, plaintiff, and said George Usher, defendant. I was paid by said Usher twenty-eight hundred dollars ($2,800.00) for building said house, exclusive of piping, sewerage, and the like, and a like house could not be put up at this time for less than thirty-five hundred dollars.

I further say that I believe the lot on which said house stands is worth at least *two dollars* [$1.60] per square foot.

JOHN H. BIRD.

Sworn to and subscribed before me this 7th day of December, A. D. 1872.

E. J. KLOPFER, *J. P.* [SEAL.]

25 *Motion and reasons of def't for vacating of sale and conveyance.—Dec.* 21, 1872.

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON
vs.
GEORGE USHER. } No. 2621. Equity docket 11.

Your petitioner, the above-named defendant, now comes, and in pursuance of the leave granted to him, by an order in this cause, passed on the 14th day of December, 1872, to show cause against the confirmation of the sale to J. W. Butterfield of the defendant's interest in the property in these proceedings, made by F. Miller, esq., trustee, respectfully shows:

Said sale ought not to be confirmed, for that—

1. The said sale was made by said trustee after sundown, as appears by the advertizement of said sale, copies whereof have been heretofore filed in the cause.

The usual and customary description of the property, by its street location and description of improvements on it, which are valuable, was omitted in said advertizement, as appears from said copies.

26 3. Said trusteee was required by the decree of sale passed on the 7th day of June, 1872, to execute his approved bond, in the sum of $2,000.00, for the faithful performance of his duties as trustee, and file the same before entering upon the performance of said duties; but said trustee did not file said bond nor execute it until long after said sale was made, to wit, on the 21st day of November, 1872, as fully appears by the record of the cause.

4. Said sale was made for a totally inadequate price, for the liens

mentioned in the advertizement of sale, subject to which and no more, as your petitioner is advised, said sale was made, (for $1,175.00,) amounted, with interest computed to the time of sale, to the sum of
27 about $1,900.00, which would make the whole interest, that of the incumbrances, as also your petitioner's equity of redemption, bring at said sale no more than the sum of $3,075.00, which is less than the value of the improvements alone, and not one-half the value of the lot and improvements. And in this connection your petitioner prays to read the several affidavits of property-owners in the immediate neighborhood of said property, herewith filed, and the affidavits and other papers heretofore filed by your petitioner, touching the value of said property.

Wherefore your petitioner prays that said sale may be annulled and set aside; that any monies paid by the purchaser to said trustee on account of said sale may be refunded to him, and that the deed to him, if one has been made, may be cancelled, and that such other and further order may be made in the premises as to your honors shall seem equitable.

And as in duty, &c.,

GEORGE USHER,
By his att'y, JAS. E. WILLIAMS.

28 *Affidavit of Jno. Bailey, behalf of def't.—Filed Jan'y* 18, 1873.

CITY OF WASHINGTON, *ss:*

JOHN BAILEY, being duly sworn, deposes and says, that on or about the day of , 1871, he being authorized so to do, offered George Usher six thousand dollars cash for his house and lot situated in this city, No. 516 4th st.; that said offer of six thousand dollars was more by five hundred dollars than this affiant believes said premises to have been worth, and that the excess of the true value of the house (said excess being, in the estimation of this affiant, about five hundred dollars) was made by affiant for Charles B. Bailey because of a desire on the part of the latter to reside near and become a near neighbor to this affiant; that said house and lot is but two or three doors from the residence of this affiant.

JOHN BAILEY.

Sworn and subscribed before me the 18th day of January, 1873.
ROB'T V. HUGHES, *J. P.* [SEAL.]

29 *Denial of def't's prayer to vacate sale.—Jan'y* 25, 1873.

In the supreme court of the District of Columbia.

HORACE S. JOHNSTON *vs.* GEORGE USHER. } No. 2621. Equity docket 11.

This cause having again come on to be heard on the petition of the defendant Usher to set aside the sale heretofore made on account of inadequacy of price and for other reasons, and counsel having been heard, it is, this 25th day of January, 1873, ordered that the prayer of the said petition be, and the same is hereby, denied; and the said sale and conveyance of the trustee, in pursuance of the said sale, be, and the same are hereby, finally ratified and confirmed. This order however,

not to prejudice the right of the petitioner for relief in any other proceeding or suit to which he may be advised.

By the court:

A. WYLIE.

30 Proceedings before the supreme court of the District of Columbia in general term, commencing on the 3rd Monday—21st day of April, 1873. Present, Justices Olin, Wylie, Humphreys, and MacArthur; Chief-Justice Cartter absent, holding the circuit court.

TUESDAY, *April* 29, 1873.

The court meets pursuant to adjournment. Present, Chief-Justice Cartter, and Justices Olin, Wylie, Humphreys, & MacArthur.

Decree gen. term, April 29, 1873, *affirming decree of special term.*

HORACE S. JOHNSTON *vs.* GEORGE USHER. } No. 2621. Equity docket 11.

This cause coming on to be heard upon the defendant's appeal from the decree of the special term of January 25, 1873, confirming the trustee's sale and conveyance, it is, upon consideration thereof, ordered, adjudged, and decreed that the said decree of the special term be, and the same is hereby, affirmed with costs.

Leave to show cause for vacating.

On motion of defendant, he is allowed to show cause for vacating this decree.

31 In the supreme court of the District of Columbia, sitting in general term.

THURSDAY, *May* 29, 1873.

The court resumes its session pursuant to adjournment. Present, Chief-Justice Cartter, and Justices Olin, Wylie, and MacArthur.

Def't allowed until June 7, 1873, *to procure bid in advance of sale-price.*

HORACE S. JOHNSTON *vs.* GEORGE USHER. } No. 2621. Equity docket 11.

Argued by Mr. Merrick for the defendant and Mr. Totten for complainant. Decision reserved till Saturday, June 7, 1873, to afford defendant an opportunity to procure an advance upon the price at which the property was sold by the trustee.

32 *Advance bid of G. W. Hauptman.—Filed June* 7, 1873.

In the supreme court of the District of Columbia, in general term.

HORACE S. JOHNSTON *vs.* GEORGE USHER. } 2621. Equity docket 11.

I, the undersigned, do hereby offer that if the sale made in this case

should be set aside and a new sale ordered, I will bid the sum of five hundred dollars ($500) more for the property than it was bid off for at the former sale.

I am worth $10,000 in real estate, and make this offer in good faith.

GEORGE W. HAUPTMAN.

33 *Offer of J. C. Smith.—Filed June 7, 1873.*

Hon. R. T. MERRICK:

SIR: I hereby offer five thousand dollars for the house and lot owned by Mr. George Usher on Fourth s't, Washington, D. C., payable $2,000 cash in hand, to remove encumbrances, and the balance in one and two years with 8 per cent. in'st.

This is in accordance with a bargain made with Mr. Usher. I am ready to carry it into effect as soon as Mr. Usher furnishes an abstract of title that is satisfactory, showing that the $2,000 will free the premises from encumbrance and that the title is perfect.

Mr. Ward (Usher's att'y) advises me that several days' time will be required to make out the abstract mentioned.

This communication may be used in court if necessary to procure the proper extension of time.

June 6, 1873.

Yours, truly,

J. C. SMITH,
Of Chipman, Hosmer & Co.

34 *Affidavit of Jno. W. Butterfield, behalf of himself.—Filed June 7, 1873.*

DISTRICT OF COLUMBIA, *ss:*

I, John W. Butterfield, resident of the city of Washington, in the District of Columbia, of lawful age, being first duly sworn, according to law, depose and say: That I am now and have been since the twelfth day of December, A. D. 1872, in possession of the house situate on the north half of lot No. 5 in square 531 in said city, together with all the appurtenances thereto belonging; that I received a deed of said half of lot No. 5, with all the privileges and appurtenances thereof, from Francis Miller, trustee, etc., and that said deed has been recorded on the land-records of said District of Columbia; that the taxes and cost of improvements on the public street in front of said north half of lot No. 5, already accrued and overdue, amount to between four hundred and five hundred dollars, and that I have made a part payment of said amount, to wit, the sum of two hundred and fifty dollars; that I have paid for abstract of title the sum of twenty dollars, and for certificate five dollars; and
35 that I also have been obliged to retain the services of an attorney to defend my title, and his reasonable fees therefor I am under obligation to compensate.

I further depose and say that the reason and cause of my attendance at the sale of the above-described house and premises on the afternoon of September 30, A. D. 1872, were of the following character: Being in the vicinity at the time, my attention was attracted by the sound of hand-bell, and on arriving at the place I learned that the premises were then being sold at auction; with no intention of buying or even bidding, but moved by curiosity I remained to see the sale. My bidding was accidental and not the result of deliberation. Plaintiff and

defendant were entire strangers to me, and the same was true of the trustee, and until after the sale I never had exchanged a word with them, and did not, until some time, to wit, several weeks afterwards, know the interest they or either of them had in the proceedings connected with the sale. The other bidders at the sale were also entire strangers to me, and neither then or since have I exchanged words with them; I solicited none to bid for me or to say or do anything in the matter, and I
36 was not solicited by any person to say or do anything for or against the sale, and I heard nothing said in any manner prejudicial to said sale. In short, my attendance at the sale was accidental; my bidding was unpremeditated.

JOHN W. BUTTERFIELD.

Sworn to subscribed before me this 6th day of June, 1873.
E. L. SCHMIDT, *J. P.* [SEAL.]

Deed—F. Miller to J. W. Butterfield.—Filed June 7, 1873.

This indenture, made this twelfth day of December, in the year one thousand eight hundred seventy-two, between Francis Miller of the county of Washington and District of Columbia, of the one part, and John W. Butterfield of the county of Washington and District of Columbia, of the other part. Whereas by a decree of the supreme court of the District of Columbia, dated on the seventh day of June, in the year one thousand eight hundred and seventy-two, and passed in a cause in said court (equity No. 2621) between Horace S. Johnston, complainant,
37 and George Usher, defendant, the above-named Francis Miller was appointed a trustee, with authority to sell the real estate in the proceedings in said cause mentioned, to wit, the equity of redemption of the said defendant in the north half of lot five in square No. five hundred and thirty-one, lying and being in the city of Washington, in the county and District aforesaid; and the said trustee, after complying with all the previous requisites of the decree, did on the thirtieth day of September, in the year one thousand eight hundred and seventy-two, sell unto the said John W. Butterfield the following parcel of real estate, and at the price following, that is to say, all that part of a lot or parcel of land lying and being in the city of Washington, in the county and District aforesaid, which is contained within the north one-half of lot number five in square numbered five hundred and thirty-one on the plats of the squares and lots of the said city of Washington, at and for the sum of eleven hundred and seventy-five dollars, lawful money of the
38 United States. And whereas the aforesaid sale has been duly reported to and ratified and confirmed by the said supreme court, and the purchase-money aforesaid having been fully paid and satisfied to the said trustee, he is authorized by the said decree to execute these presents:

Now this indenture witnesseth that the said Francis Miller, trustee as aforesaid, for and in consideration of the premises as aforesaid, and of the sum of eleven hundred and seventy-five dollars, lawful money of the United States to him in hand paid by the said John W. Butterfield at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, aliened, enfeoffed, released, and confirmed, and by these presents doth grant, bargain, and sell, alien, enfeoff, release, and confirm unto the said John W. Butterfield, his heirs and assigns, all the aforesaid part of a lot or parcel of land, which is hereinbefore described, as sold by the said trustee to the

said John W. Butterfield, with its appurtenances, and all the right,
39 title, interest, and estate of the party to the aforesaid decree, both at law and in equity, in and to the same and every part and parcel thereof.

To have and to hold the aforesaid part of lot or parcel of land and premises, with their appurtenances, unto the said John W. Butterfield, his heirs and assigns, to his and their only proper use and behoof, and to and for no other use, intent, or purpose whatsoever.

In witness whereof the said Francis Miller hath hereunto set his hand and seal the day and year hereinbefore written.

FRANCIS MILLER, *Trustee.* [SEAL.]

Signed, sealed, and delivered in presence of—
E. L. SCHMIDT.
E. TOTTEN.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, E. L. Schmidt, a notary public in and for said county, do certify that Francis Miller, the trustee above named, and party to a certain deed bearing date on the 12th day of December, in the year of
40 our Lord one thousand eight hundred and seventy-two, and hereto annexed, personally appeared before me, in the county aforesaid, the said Francis Miller being well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and seal this 12th day of December, 1872.

[L. S.] E. L. SCHMIDT, *N. P.*

(Endorsement on deed:) Received for record December 12, 1872, and recorded in Liber No. 704, folio 148, one of the land-records for Washington County, in the District of Columbia, and examined by S. Wolf, recorder.

41 *Affidavit of John M. Hanson, behalf of Butterfield.—Filed June 7, 1873.*

JOHN M. HANSON, being first duly sworn, doth depose and on his oath say that he well knows the property sold, in pursuance of the decree heretofore passed in the above-entitled cause, and that he is now, and for many years last past has had great experience and opportunities of observation in and about the sale of real estate in the city of Washington; that in his opinion the said property is not worth more than $3,500.00; and if the same shall be put up at public auction, and sold to the highest bidder, it will, in his opinion, not bring more than $3,500.00. And if sold subject to the incumbrances upon it, and to the arrears of taxes, and the unsettled assessments for paving the street, it will not, in his opinion, bring as much as $3,500.00.

And further this deponent saith not.

JNO. M. HANSON.

Subscribed and sworn to before me this 24th day of January, 1873.

W'M MARTIN, *J. P.* [SEAL.]

42 *Affidavit of B. H. Warner, behalf of Butterfield.—Filed June 7, 1873.*

B. H. WARNER, being first duly sworn, doth depose and on his oath

say that he now is and for several years last has been engaged in business in the city of Washington as an auctioneer and real-estate agent. As such auctioneer he has made many sales in said city, under deeds of trust and decrees of this court; that the property heretofore sold under the decree of this court in this cause, being a small house and lot on 4th street, bet. E & F, is familiar to him, and that, in his opinion, the said property could not be sold at public auction, subject to the incumbrances, taxes, and assessments, for a greater sum than from $3,500.00 $4,000.00.

BRAINARD H. WARNER.

Subscribed and sworn to before me this 24th day of January, 1873.
E. L. SCHMIDT, *J. P.* [SEAL.]

43 *Affidavit of W. B. Webb, behalf of Butterfield.—Filed June 7, 1873.*

WILLIAM B. WEBB, being first duly sworn, doth depose and say that he knows the property sold in pursuance of the decree in this cause; that he is a lawyer by profession, and that he has made many sales of real estate in this city during the five years last past, both under deeds of trust and decrees of this court, and that he is of the opinion that the said house and lot, if again put up and sold at public sale, would not bring more than thirty-five or thirty-seven hundred dollars; that he estimates the ground as being worth about $100 per foot, and the improvements as being worth about $1,500.

W. B. WEBB.

Subscribed and sworn to before me this 24 day of January, A. D. 1873.
E. L. SCHMIDT, *J. P.* [SEAL.]

44 *Affidavit of T. E. Waggaman, behalf of Butterfield.*

THOMAS E. WAGGAMAN, being first duly sworn, doth depose and on his oath say, that he is now, and for a long time has been, an auctioneer, and engaged in buying and selling real estate in Washington City, and as such auctioneer has made very many sales of houses and lots under decrees of this court and deeds of trust; that he has examined the premises sold under the decree in the above cause, and known as the north half of lot 5, square No. 531, in the city of Washington, and the building situated thereon, and the said premises are familiar to him; that the said dwelling-house is not the kind of building to attract purchasers, as it is too far toward the front to be used for a back building, and it is not fit for a front building; that said property contains about 2,280 square feet of ground, according to the plat of the city of Washington, which, in my opinion, will bring at public sale $1.00 per square foot, and not more, and the said building not worth more than $1,500 at a liberal estimate. I am of the opinion that the said property,
45 if put up at public auction and sold, would not bring more than $3,500.

I am informed and believe that the said property is encumbered by two deeds of trust—one for $1,025.00, now overdue, and the other for $762.62, which falls due Jan'y 25, 1873, and that the said property has been sold for a bill of taxes amounting to about $426.00, and that the assessment for paving the street in front thereof has not been yet made. If said property should sold a second time, and subject to the incum-

brances above mentioned, the bids would probably be largely diminished by these circumstances, both as to numbers and amount.

THO. E. WAGGAMAN.

Sworn to and subscribed before me this 23d day of January, 1873.

R. H. HYDE, *J. P.* [SEAL.]

46 *Affidavit of J. F. Kelly, behalf of Butterfield.*

JOSEPH F. KELLY, being first duly sworn according to law, deposes and says that he has for many years and now is engaged in the business of buying, selling, hiring, and letting real estate in the city of Washington; that he is familiar with the lot 5, north ½, in square 531, and number 513, in said Washington, situate on 4th st., N. W.; that, owing to the situation of the house on said lot being about the middle of the said lot, a building like that adjoining consisting of three stories, and with a front on the building-line, could not be built without first tearing down a portion of the present building, say the half fronting the street; that, excepting for building materials, the present house on said lot would prove an incumbrance to a person intending to build a new house with a front on the building-line; that, in the opinion of deponent, derived from experience in buying and selling of real estate, said lot would sell more readily without the present house on it, and would bring very nearly as high a price, the value of the old materials en-
47 hancing the price of the lot, without the present house as with it; that at cash sale at auction said house and lot would not sell at the present time for more than the assessed valuation by the present authorities of this District; that he is in no way, directly or indirectly, interested in the premises, and further sayeth not; and I understand this assessed valuation to be thirty-five hundred dollars.

JOS. F. KELLY.

Subscribed and sworn to before me this second day of January, A. D. 1873.

E. C. WEAVER, *J. P.* [SEAL.]

48 In the supreme court of the District of Columbia, sitting in general term.

SATURDAY, *June* 7, 1873.

The court resumed its session pursuant to adjournment. Present, Chief-Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur.

Resale ordered June 7, 1873.

HORACE S. JOHNSTON *vs.* GEORGE USHER. } No. 2621. Equity docket 11.

Upon the offer of the defendant making an advance on the sale heretofore made, it is ordered, adjudged, and decreed by the court, this 7th day of June, A. D. 1873, that the sale heretofore made in this cause by Francis Miller, esq., trustee, be, and the same is hereby, vacated and set aside. And it is further that the said trustee may proceed to advertise and resell the property, and that the expenses of the cause

heretofore incurred may be paid out of the proceeds to be realized
49 from the sale hereby directed to be made. And it is further ordered that the money in the hands of the trustee be paid back to the purchaser, with interest thereon at the rate of ten per cent. per annum, to be paid by the defendant, Usher, and to be deducted by the trustee from the proceeds to come into his hands from the further sale hereby ordered.

And it is further ordered that the trustee, in reselling the property, put up the same at a sum not lower than the sum realized at the former sale, together with the sum of five hundred dollars advance offered by George W. Hauptman.

From which decree the purchaser, John W. Butterfield, by Enoch Totten, his solicitor, now here in open court prays, and is allowed his appeal to the Supreme Court of the United States.

By order of the court.

50 In the supreme court of the District of Columbia, the 17 day of June, 1873.

HORACE S. JOHNSTON
vs.
GEORGE USHER. } No. 2621. Equity docket.

Know all men by these presents, that we, John W. Butterfield, are bound unto the above-named defendant, George Usher, in the sum of three thousand dollars, to be paid to the said George Usher, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 17th day of June, 1873.

Whereas the above-named John W. Butterfield hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named John W. Butterfield shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JOHN W. BUTTERFIELD. [L. S.]
E. B. CURTIS. [L. S.]
JOHN C. WILSON. [L. S.]

Sealed and delivered in presence of—
H. S. CUMMINGS.
SAM'L B. PARRIS.

Approved June 18th, 1873.

MACARTHUR, *Justice.*

(Indorsement on cover:) No. 293. John W. Butterfield, appellant, vs. George Usher. Dist. of Columbia sup. c't. Filed 20th October, 1873.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1875.

JOHN W. BUTTERFIELD,
APPELLANT,

vs.

GEORGE USHER'S ADMINISTRATOR, APPELLEE.

No. 76.

ENOCH TOTTEN,
Counsel for Appellant.

Jos. L. Pearson, Printer, 9th and D streets, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1875.

JOHN W. BUTTERFIELD,
APPELLANT,

vs.

GEORGE USHER'S ADMINISTRATOR, APPELLEE.

No. 76.

The original bill in this cause was filed in the Supreme Court of the District of Columbia by a judgment creditor of the defendant, George Usher, to enforce the collection of a judgment out of the equitable interest of the judgment debtor in the real estate described in the proceedings and now in controversy.

The bill was filed on the 23d day of December, 1871, and alleges that the said Usher was seized of certain real estate in the City of Washington, being lot 5 in square 531, and that there were three subsisting incumbrances upon the property amounting in the aggregate to $2,590. That in the year 1871, the complainant had obtained a judgment against the said Usher, which was unpaid and unsatisfied, and that a writ of *fieri facias* had been issued upon said judgment and had been returned "*nulla bona.*"

The bill prayed that the equity of redemption of the defendant in the property might be sold to pay the said judgment, and for general relief.

The answer of the defendant, Usher, admitted that the charges in the bill were substantially true, and averred that the incumbrances on the property described in the bill, were executed in good faith and prior to the entry of the complainant's judgment. The answer also alleges that the value of said property was between five and six thousand dollars, and insisted that a sale thereof at auction would result disadvantageously to the defendant.

On the 7th day of June, 1872, the cause was heard on bill, answer, and replication, and a decree was entered appointing a trustee to sell the equity of redemption of the defendant Usher in the property, and providing that the conveyance of the property should be made to the purchaser, only upon the full payment of the purchase money, (3.)

On the 30th of September, 1872, after having allowed the judgment debtor two or three months to procure money to pay off the judgment of the complainant, and after having first advertised the property according to the requirements of the decree, the trustee sold the equity of Usher in the property at public auction to the appellant, John W. Butterfield, he being the highest bidder, for the sum of $1,175.00, and on the 16th day of October, 1872, made his report of the sale to the court.

The purchaser was an entire stranger to the proceedings, and was a *bona fide* bidder. He had no thought of buying the property or even of bidding for it, but being attracted by the sound of the auctioneer's bell, joined the company on the premises, and having made his bid, the property was knocked off to him, (13.)

The report of the sale remained in court without action until November 15, 1872, when an order was made ratifying and confirming the sale, unless cause to the contrary should be shown, on or before the 10th day of December, 1872, (7.)

No cause having been shown on or before the date specified, the purchaser paid to the trustee the purchase

money in full, and the trustee thereupon executed and delivered to him a deed of conveyance dated and acknowledged on that day, whereby he conveyed to said purchaser all the interest and estate of the parties to the suit in the property sold, and the deed was duly filed for record in the office of the recorder of deeds for this district on the same day, (14.) The trustee thereupon made his second report showing these facts, (8,) and upon this report the court made another order ratifying and confirming the trustee's action in the premises. This second report and the order based upon it were made on the 12th day of December, 1872, (8.)

On the 14th day of December, 1872, the court made an order annulling the last-mentioned order of ratification, passed on the preceding 12th of December, and granting leave to the defendant to show cause on the 21st day of December, 1872, against the confirmation of the said sale, (9.)

On the 21st day of December, 1872, the defendant filed his petition setting forth his reasons why the sale should not be confirmed. These reasons were, that the sale was made after sundown; that the advertisement did not state on what street the property was situated; that the trustee did not file his bond until after the sale, and that the price for which the property was sold was totally inadequate. The petition was not sworn to, but in support of the allegation that the price was inadequate, the defendant filed several affidavits.

Counter affidavits were filed in the case, to show that the sale had been fairly conducted, and the price bidden for the property was a reasonable one.

On the 25th of the same month, the cause came on for hearing on the petition of defendant and the affidavits, and the court, after argument by counsel, again ratified and confirmed the sale. From this last order of confirmation, the judgment debtor appealed to the general term of said court.

When the cause came on for hearing in the general term, the court postponed the cause for nine days, to give the defendant an opportunity to procure an advance upon the price at which the property had been sold by the trustee, (12.)

At the end of that time two offers were made; one that the person making it "would bid" $500 more than the price obtained by the trustee; the other was an offer of $5,000 for the property, $2,000 of which was to be paid in cash. This last offer was made upon the condition that the incumbrances did not exceed $2,000, and that the title was perfect, (13.)

It appears from the affidavits filed in the cause, that the property is estimated to be worth from $3,000, to $5,500, and that the lot contains 2280 square feet of ground. Some of the affiants say the ground is worth $1.00 and others say it is worth $2.00 per square foot.

The report of the trustee was sworn to, and states that there was a good company present and several bidders, and that the interest of Usher in the property was sold for its fair value. The affidavit of the auctioneer alleges that the sale was made fairly and in the usual way, and that the price was a fair one. The complainant swears that the price bidden by the appellant was more than he was willing to pay.

The building is estimated, in two of the affidavits, as being worth $1,500.00; in one affidavit as being worth $3,500.00, and in another, to be of no benefit whatever to the property, except what it may be worth for the old material therein.

The unpaid taxes, including the assessment for paving the street, amount to about $500.00, (5, 13, 16,) and the incumbrances set forth in the bill, and admitted in the answer, amount to $2,590.

At the time of the sale a large sum was due for unpaid taxes, and the incumbrance for $1,025.00 was also due and had been over due for a long time.

The purchaser incurred large expenses for opposing the application to vacate the sale, and in investigating the title to the premises, and he had paid $250.00 on account of the over-due taxes, (13.)

On the 7th day of June, 1873, the court on appeal passed a decree vacating and setting aside this sale made by the trustee, and directing him to refund the money in his hands to the purchaser, with ten per cent. interest, and to proceed to re-sell the property, (17.)

From this decree the purchaser appealed to this court, and for error in said decree the following is assigned in his behalf:

The court erred in passing the decree vacating and setting aside the sale.

Points and Authorities.

First.—After the order was made by the court confirming the sale, the title vested in the purchaser absolutely, and he could not be divested by any subsequent order annulling such order of confirmation.—*Brown vs. Gilmore's Exr.*, 8 Md., 322.

The act of Congress of February 22, 1867, (14 Stat., 406,) relating to judicial proceedings in the District of Columbia, provides "that in case of the sale of things real or personal, under a decree in equity, the decree confirming the sale shall divest the right, title, or interest sold, out of the former owner, party to the suit, and vest it in the purchaser, without any conveyance by the officer or agent of the court conducting the sale."

In addition to this, a deed of conveyance had been executed and delivered to the purchaser by the trustee, and had been recorded.

The title to the land having vested in the purchaser, he could not be deprived of his rights, except in a suit brought against him for that purpose, and regularly proceeded in to judgment.

Second.—The defendant in his application made no charge of fraud or misconduct on the part of either the trustee or purchaser, nor did he allege that he was in any way surprised. His application for a re-sale of the premises rested upon the ground of inadequacy of price.

Inadequacy of price is not sufficient to vacate a judicial sale, unless it be so gross as to indicate that the trustee who made the sale has been guilty of misconduct or fraud.—*Johnson vs. Dorsey*, 7 Gill, 269; *White vs. Wilson*, 14 Vesey, 151; *Woodhull vs. Osborn*, 2 Edw., 616; *Amr. Ins. Co. vs. Oakland*, 9 Paige, 250; *Williamson vs. Dale*, 3 John. Ch., 290; *Cohen vs. Wagner*, 6 Gill, 236; *Duncan vs. Dodd*, 2 Paige, 100; *Cooper vs. Galbraith*, 3 Wash., 546; *West vs. Davis*, 4 McLean, 241; *Duncan vs. Saunders*, 5 Ill., 475; *Coleman vs. Bank*, 2 Strobh. Eq. R., 285; *Reed vs. Brooks*, 2 Little, 127; *Wallace vs. Beyer*, 25 Iowa, 456; *Comstock vs. People*, 49 Ill., 158; *McMullen vs. Gable*, 47 Ill., 67; *H. & S. R. R. Co. vs. Brown*, 43 Mo., 294; *Marlatt vs. Warwick*, 3 Green N. J., 108.

The weight of the evidence to be gathered from the affidavits and the records in the cause, is in favor of the assertion that the price paid for the property was a fair one.

Third.—The rule of the English courts under which they open biddings, *before confirmation of the sale*, upon an offer of a reasonable advance on the amount bid, has never been adopted in this country.—*Williamson vs. Dale*, 3 John. Ch., 290; *Duncan vs. Dodd*, 2 Paige, 100.

But the general rule in the English courts is that a sale shall not be disturbed upon an offer of advance after confirmation, except upon the ground of misconduct on the part of the purchaser—*White vs. Wilson*, 14 Vesey, 151; *Morice vs. Bishop of Durham*, 11 Vesey, 57.

And in cases where those courts have departed from the general rule and opened the biddings under special circumstances, they have required a deposit of the whole sum offered in advance.—*Watson vs. Birch*, 2 Vesey, 52.

The court, in the present case, had no reasonable assurance that the offers, on which the sale was vacated, were reliable or made in good faith.

The purchaser had expended large sums of money about his purchase, and the court, on vacating the sale, made no adequate provision for making him whole in this respect. Being a *bona fide* purchaser he was entitled to fair treatment.—*Duncan vs. Dodd*, 2 Paige, 100.

Fourth.—The judgment debtor is chargeable with inexcusable laches. He had from September 30 until December 10, to make his objections to the sale, but he made none until after the purchaser had paid his money to the trustee, and the title of the property had been vested in the purchaser.

ENOCH TOTTEN,
Counsel for Appellant.

Supreme Court of the United States.

No. 70.

JOHN W. BUTTERFIELD, APPELLANT,

vs.

GEORGE USHER.

Appeal from the Supreme Court of the District of Columbia.

BRIEF ON BEHALF OF APPELLEE.

This is an appeal by a purchaser at a trustee's sale, from an order of court vacating the sale to him, and decreeing a re-sale.

The bill in the cause was filed by one Johnston, a judgment creditor of the appellee Usher, to reach the equity of redemption of the latter in some real estate, in the city of Washington. A decree was rendered in favor of Johnston, by which a trustee was appointed to make sale of the property in question. The trustee sold and conveyed to Butterfield, the present appellant. The sale was reported to the Court, and confirmed, and a reference was directed to the Auditor. On motion of the defendant Usher, the order of confirmation was vacated two days after it had been entered, and at the same term of the Court; and the time was extended for him to show cause against the confirmation. The special term ultimately overruled his motion to vacate the sale, and an appeal was taken to the general term. The

general term first affirmed the order of the special term, but finally, upon a further hearing, reversed it and vacated the sale; and from that last decision, the purchaser Butterfield has appealed.

Writing in advance of the filing of any brief by the appellant, we are not apprized what errors he proposes to assign to the decision of the court below; and hence we are unable to address ourselves specifically to the discussion of any such errors. But the scope for argument is very limited, as the only question in the case seems to be the power of the court below to vacate the sale made to the appellant, and whether the court was justified, under the circumstances, in exercising that power.

I.

Admitting, under the decision of this Court in the case of Blossom *vs.* The Milwaukee, &c., R. R. Co., (1 Wallace, 655,) that a purchaser at a judicial sale becomes so far a party to the record as to be entitled to be heard in defence of his rights and to carry his case by appeal to a higher tribunal, yet that case left undecided the question how far this Court would assume to revise the discretionary action of an inferior tribunal in refusing to confirm or complete a sale; and the subsequent decision on the merits of the case, reported in 3 Wallace, 196, is not entirely decisive of this question. The case of Delaplaine *vs.* Lawrence, (10 Paige, 602,) which is relied upon in the decision in 1 Wallace, seems to have arisen under a special statute of the State of New York, and not to be of general application. It is submitted that, while in a proper case and upon proper pleadings, an aggrieved purchaser is entitled to the benefit of the doctrine announced in these decisions, that doctrine can scarcely apply to summary judgments and orders of Court based upon *ex parte* affidavits.

II.

The power of a court of equity to vacate a sale at any time before confirmation, is too well established to be questioned. "It has under its control all sales made by its order until final disposition is made of the cause. It can set aside the sale altogether, or open the biddings, or make any other order that may be necessary for the enforcement of the decree." And the purchaser is a party to the proceedings, must have a final order to make his purchase effectual, and is under the control of the court for enforcement of the purchase against him.

Rorer on Judicial Sales, p. 154.
Deadrick *vs.* Smith, 6 Humph., (Tenn.,) 138.
King *vs.* Platt, 37 N. Y., 155.

The ratification of the sale by the special term of the Supreme Court of the District of Columbia did not make the purchaser's title absolute, or in any manner detract from the power of the general term, in the exercise of its appellate jurisdiction under the statute, to vacate the sale. No rights became vested pending the appeal.

III.

Was the General Term of the Supreme Court of the District of Columbia justified in vacating the sale to Butterfield?

If this Court will assume to revise a discretion exercised upon a mere motion and *ex parte* affidavits, and it is respectfully suggested that the exercise of such a revising power is attended with great difficulty and embarrassment, we submit that the decision of the Court below was just and proper.

The preponderance of testimony, as exhibited in the affidavits, is to the effect that the property was sold for

much less than its real value. But even conceding that the testimony leaves this in doubt, the advance upon the bid of Butterfield made by two responsible persons had an important and proper effect in determining the opinion of the Court. Such an advance has always been held in England as a sufficient ground for ordering a re-sale, and the same rule prevails in many of the States.

See Blossom *vs.* Railroad Company, 3 Wallace, 196.
Childress *vs.* Hurst, 2 Swan, (Tenn,) 487.
Hay's Appeal, 51 Penn. St., 58.
Wright *vs.* Cautzon, 31 Miss., 514, 517.
Rorer on Judicial Sales, p. 163.

The offer of an advance was conclusive proof of the inadequacy of the price; and but slight circumstances are required in connection with such inadequacy to authorize a vacation of the sale. It is believed that these circumstances are sufficiently stated in the defendant's motion on page 10 of the printed record.

It will be noticed that the deed from the trustee to Butterfield was made before the expiration of the twelve months limited in the decree of sale. But it is submitted that this deed does not confer any greater right on the purchaser than he had without it.

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